that of the patentee are shown and described, and after pointing out the technical differences, emphasizes the fact that the sales of the subject of the patent indicated a phenomenal demand for it, while the demand for the old devices had been in each instance too small to be worth consideration.

"Under such circumstances," it is said, "courts have never been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into success. In the law of patents it is the last step that wins. . . . There was evidently, prior to Glidden's application, more or less experimenting in a rude way. . . upon the subject of barb wires as applied to wire fences; and we think that it is quite probable that coiled barbs were affixed to single wires before the Glidden application was made. We are not satisfied, however, that he was not the originator of the combination claimed by him. . . . It is possible that we are mistaken in this. But it was Glidden, beyond question, who first published this device, put it upon record, made use of it for a practical purpose, and gave it to the public, by whom it was eagerly seized upon, and spread until there is scarcely a cattle-raising district of the world in which it is not extensively employed. Under these circumstances, we think the doubts we entertain concerning the actual inventor of this device should be resolved in favor of the patentee."

There can be no doubt about the significance of this generalization. It does not go beyond the requirements of the case; but the case was a marginal one, and for this reason the generalization is valuable. To defeat a meritorious patent there must be (1) "*knowledge*" and (2) "*existing* knowledge." There must be in the past a thought which matches the thought of the patentee, and that thought must have taken root. The circumstance that the same concept may as a problem or conjecture for a limited period have occupied another mind, does not affect the right of the mind that solved the problem. It may even be that the solution itself took form in the mind which at an earlier date had the problem before it. But unless the solution was seen and understood to be a solution, the right of the patentee who published it and gave it place and certainity in the arts is unaffected.

Mr. Justice Brown's opinion may be said to be distinctly ethical in its nature. It construes the contract between the patentee and the public as it ought to be construed in a court of equity, and is in effect an announcement that wherever the public have received the benefit which should be the foundation of a patent, the grant will, if possible, be held good.

"ACCEPTANCE" UNDER THE STATUTE OF FRAUDS; THE LATE ENGLISH DOCTRINE SLIGHTLY SHAKEN. — The case of *Taylor* v. *Smith*, 67 L. T. Rep. N. S. 39, gives some ground for hope that the doctrine put forth some fifteen years ago as a corollary to *Morton* v. *Tibbett*, — a doctrine as illogical in its origin as absurd in its result, — is held at its true worth by at least a part of the English judges. *Morton* v. *Tibbett* decided merely that a resale of goods before receipt was evidence for the jury of such an acceptance as would satisfy the Statute of Frauds, though it would not cut off a right of action for inferiority to sample. Though there was nothing necessarily misleading in Lord Campbell's language in that case, it was seized upon by the English judges as an excuse for satisfying their dislike for this section of the statute, by making this perfectly reasonable

decision serve as a pedestal to the paradoxical doctrine that rejection by itself could be evidence of acceptance. Thus acceptance came to mean some evidence that the defendant acknowledged the existence of some contract, in intended fulfilment of which the goods were shipped. This notion got pretty well on its feet in *Kibble* v. *Gough*, where the judges, in a case that might have gone on a proper ground, took occasion to state, in the language of Lord Justice Brett, that "there was a sufficient acceptance under the Statute of Frauds, although there was still a power of rejection." This substitution of "rejection" for "objection" took its full expression in *Page* v. *Morgan*. There, all that was done by the defendant was to have some of the bales of cotton hoisted into his loft for examination, upon which they were promptly rejected. Lord Justices Brett, Baggallay, and Bowen found in this "an acceptance that could not have been made except upon the admission that there was a contract, and that the goods were sent in fulfilment of it. The defendant accepted the goods to see if they agreed with the sample," which is a dealing with the goods involving the admission of a contract.

The Court of Appeal now finds before them a case almost identical in its facts with *Page* v. *Morgan*. Receipt is fairly clear, and the only real difficulty arises on acceptance. The evidence of this was that the defendant, on receiving an advice note from the carrier that a certain number of deals were at his door for him, examined them, and then wrote across the advice note, "Refused. Not according to representation. J. SMITH," and returned it to the carrier. Eleven days later, after some correspondence between the carrier and the plaintiffs, the defendant wrote the plaintiffs as follows: "With reference to the deals now lying at Kenworthy's, they are not according to representation, and much inferior in quality to St. John's spruce deals I have seen. I consider them 10*s*. per standard below average value, and therefore cannot accept same. J. SMITH."

This was a much more conclusive acknowledgment of the existence of a contract than can be found in *Page* v. *Morgan;* but Judge Wright, sitting without a jury, found that there was no acceptance, so that though the goods were according to sample, the plaintiff could not recover. The case went up on appeal, the main question being whether the judge below was wrong on the question of acceptance. Of course, in supporting his decision, the court is able to distinguish the actual decision in *Page* v. *Morgan*, as the question was merely whether there was evidence of acceptance to go to the jury. The language, however, is sufficiently unenthusiastic. Receipt is not enough, Lord Herschell says. "That has been held in several cases of long standing, which have not been overruled by the subsequent cases, although the latter, no doubt, contain some *dicta* which may not be consistent with former cases. . . . What the exact meaning is of the word 'acceptance' in the statute it is not necessary now to determine, nor has it ever been determined."

Though Lord Herschell states that he is only deciding that he cannot say the judge below was wrong, he does give his opinion on the facts: "The mere inspection of these goods by the defendant on the two occasions I have referred to, did not amount to an acceptance, even when accompanied by such delay as there was in communicating with the vendors."

Lord Herschell understands the feeling that has led the judges into this absurdity, and seems to sympathize with their dislike of the famous

section; but he does not feel their way of showing their disapproval to be either honest or advisable. "If I could come to such a conclusion," he says, "I should not be indisposed to arrive at it, because where there is a contract one does not like to allow it to be repudiated. But I think that even greater hardship would be the result by frittering away the effect of the statute by nice distinctions."

Lord Justice Lindley distinguishes *Morton* v. *Tibbett* without trouble, remarking that about that case he says "nothing, except that I accept it. I think it plain that there is no acceptance at all. It is paradoxical to say that when a man sees a thing and rejects it he accepts it."

Of course this is careful language, but it seems sufficient to warrant a hope that as the unworthy ancestry of the doctrine is now distinctly seen, and its sophistry appreciated, the notion may soon be tested in the House of Lords, and either laid to rest forever, or made unimportant by the repeal of the obnoxious provision.

THE MEANING OF "PENAL" IN INTERNATIONAL LAW.— The case of *Huntington* v. *Atrill*, 8 Times L. R. 341, decided this spring in the Privy Council, is an important addition to a difficult and somewhat confused branch of International Law. The only case quoted as directly in point is a proceeding in equity between the same parties in Maryland in 1889 (70 Md. 191). A New York statute provides that if any certificate or report made, or public notice given, by the officers of a certain corporation be false in any material representation, "all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." The damages sought for false representation under this statute in these two cases was over $100,000. The defence was that as the clause was penal, a rule of international law forbade recovery in a foreign jurisdiction. That the courts of one State will not enforce the penal code of another is not disputed, and the only important controversy is on the meaning of the word "penal." The Maryland court decided, by five judges against two, that there could be no recovery. Their argument was that the clause does not give mere compensation for injury to the individuals injured, but gives compensation to all the subscribers, whether affected or not by the misrepresentation, and that to the full extent of their claim, as soon as it is shown that any offence of the kind forbidden has been committed. "It is extremely difficult to conceive that the statute was not intended to provide a punishment for the obnoxious acts. The payment of a sum of money, which a party would not otherwise be obliged to pay, is no less a punishment because it is inflicted through the medium of a civil suit instead of a criminal prosecution." This last point is supported at some length by the learned judge, though the dissenters accept it freely. They also agree with Judge Bryan that his numerous quotations prove that in construing statutes "penal" is often used as equivalent to punitive, in distinction from compensatory. What they do is to supplement his quotations with others bringing out a meaning equally well defined, which they hold to be the proper one as applied to the rule of international law under discussion. In this sense, says Judge Stone, for the dissent, the word "penal" is used only where the action is not for a private injury, but in the name of the State for the violation of her laws. He finds a satisfactory statement in the case of *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S.